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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CENTER FOR BIOLOGICAL DIVERSITY, KENTUCKY ENVIRONMENTAL FOUNDATION, and SIERRA CLUB, Plaintiffs, v. RURAL UTILITIES SERVICE, a federal agency within the United States Department of Agriculture, Defendant.	Case No. 08-1240-MMC PLAINTIFFS' RESPONSE TO MOTION TO INTERVENE

Plaintiffs hereby respond to and oppose (in part) East Kentucky Power Cooperative, Inc.'s (EKPC's) motion to intervene.

The Ninth Circuit has stated that private parties, because they are not bound by NEPA,

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have no right to intervene in the merits phase of a NEPA lawsuit; and may intervene in the remedy phase only when they have sufficient particularized vested rights affected by the proposal at issue. EKPC cannot be an appropriate party on the merits of the case; and has not met the standard for intervening in the remedies phase.

If the court does find that EKPC has an interest sufficient to allow intervention, it should follow the rulings of the Ninth Circuit and limit its intervention to the remedies phase of this lawsuit, and impose other limits, as set forth at the end of this brief.

I. THE PROPOSED INTERVENOR DOES NOT MEET THE TEST FOR FULL INTERVENTION

"The burden is on [the intervenors] to demonstrate that the conditions for intervention . . . [are] satisfied." Petrol Stops Northwest v. Continental Oil Co., 647 F.2d 1005, 1010 n.5 (9th Cir. 1981), cert. denied, 454 U.S. 1098 (1981). The National Environmental Policy Act (NEPA) imposes duties only upon the federal government, and "[i]n a suit such as this, brought to require compliance with federal statutes regulating government projects, the governmental bodies charged with compliance can be the only defendants." Portland Audubon Society v. Hodel, 866 F.2d 302, 309 (9th Cir. 1989), cert. denied, 492 U.S. 911 (1989) (hereinafter PAS). Thus, the only real party in interest as to the NEPA merits in this case is the government agency, RUS. In addition, EKPC's interests are adequately represented by the government. Plaintiffs request that the Court deny the motion to intervene or in the alternative limit the participation of EKPC, as further explained below.

A. EKPC Has No Right to Intervene Because the Sole Issue Is Whether RUS Complied with Procedural Duties under Federal Environmental Laws

The subject of this action is RUS's decision to approve EKPC's request for "possible

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financing assistance" for "the construction of two new J.K. Smith Station combustion turbine electric generating units (CTs), two new electric switching stations, and the 36-mile, Smith-West Garrard 345 kilovolt (kV) electric transmission line located in Clark, Madison, and Garrard Counties, Kentucky" ("the transmission line project"). Plaintiffs allege that RUS's decision violates the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 et seq., and the Administrative Procedure Act (APA), 5 U.S.C. § 706. Neither of these statutes imposes any duties upon EKPC, and neither statute creates any special rights on its behalf.

The rule is well established in this circuit and elsewhere that the prospect of benefit to private parties does not support intervention in citizens' suits seeking to compel agency compliance with federal environmental statutes. See PAS, 866 F.2d at 308-09. Unlike the test for standing, in deciding a motion to intervene the Ninth Circuit does not look to the "zone of interests" of the statute at issue, but rather to whether the proposed intervenor has a legally protectable interest. Sierra Club v. U.S.E.P.A., 995 F.2d 1478, 1484 (9th Cir. 1993) (harmonizing previous opinions).

The Ninth Circuit has consistently held that under Rule 24(a), "private parties do not have a 'significant interest' in NEPA compliance actions." Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1108 (9th Cir. 2002). "The rationale for our rule is that, because NEPA requires action only by the government, only the government can be liable under NEPA. Because a private party can not violate NEPA, it can not be a defendant in a NEPA compliance action." Wetlands Action Network v. United States Army Corps of Engineers, 222 F.3d 1105, 1113-14 (9th Cir. 2000). In so holding, the Ninth Circuit has adopted reasoning from at least two other circuits.

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In PAS, the court noted that it was adopting the Seventh Circuit's reasoning in Wade v. Goldschmidt, 673 F.2d 182, 184-85 (7th Cir. 1982), a case closely on point with the instant case. 866 F.2d at 309. In Wade, one of the proposed intervenors was a corporation involved in construction of the bridge project at issue, and thus was in a similar situation to EKPC in the instant case. The court noted:

> [T]he only focus that the ongoing litigation . . . can have is whether the governmental bodies charged with compliance, defendants, have satisfied the federal statutory procedural requirements in making the administrative decisions . . . . In a suit such as this, brought to require compliance with federal statutes regulating governmental projects, the governmental bodies charged with compliance can be the only defendants. As to the determination involved in this suit, all other entities have no right to intervene as defendants.

Id. See also United States v. South Florida Water Management District, 922 F.2d 704, 710-11 (11th Cir. 1991) (denying intervention to agricultural organizations in a suit challenging the defendant's operation of water control structures without permits because the farmers' economic interests were not protectable by the substantive law requiring the permits).

Adopting this reasoning, in PAS, the Ninth Circuit held that logging groups had no right to intervene with respect to the NEPA claim in a case seeking to enjoin harvesting in old-growth forests because only "the governmental bodies charged with compliance can be the . . . defendants." 866 F.2d at 309 (9th Cir. 1989). The timber association was not allowed to intervene because "the loggers . . . had an interest in securing timber, but no existing legal right to it." Id.

EKPC makes dire predictions about the economic impact to its company if the government loses this lawsuit. But "in a NEPA case, someone who will be economically worse off if an environmental impact statement precedes a major government action nevertheless has

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no interest protected by law in defending against issuance of an environmental impact statement." Sierra Club v. U. S. E.P.A. 995 F.2d 1478, 1485 (9th Cir. 1993) (distinguishing Clean Water Act cases from NEPA cases). This is because "NEPA does not regulate the conduct of private parties or state or local governments." Id.

Private parties may have a "significantly protectable" interest only in the remedial phase of a NEPA case. In Forest Conservation Council v. U. S. Forest Service ("FCC"), the State of Arizona and Apache County were found to have "protectable" interests in the injunctive phase of a NEPA action. 66 F.3d 1489, 1494 (9th Cir. 1995). See also Churchill County v. Babbitt, 150 F.3d 1072, 1083 (9th Cir. 1998), as amended by 158 F.3d 491 (9th Cir.1998) (Sierra Pacific permitted to intervene in remedial phase of NEPA suit but court reiterated that the interests asserted by the appellant "suffice only to grant them intervention in the remedial phase" for the "[a]ppellant does not have a 'significantly protectable' interest in federal government compliance or noncompliance with NEPA.").

EKPC cannot satisfy this first part of the "intervention of right" test. EKPC does not have a "significantly protectable" interest in NEPA compliance. EKPC argues its "significantly protectable" interest derives from its statutory and contractual obligations to members of the public in its coverage area. EKPC Br. at 6. According to EKPC, a decision in the plaintiffs' favor will affect the financial assistance it receives from RUS, thereby harming its ability to provide electric service to the public. However, this purported "significantly protectable" interest is similar to the interest asserted by the logging groups in PAS. While EKPC may have hoped for or even expected the financial assistance from RUS, this is similar to the expectation held by the loggers in their continued ability to harvest old-growth. EKPC has no legal right to

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receive money from the agency.

EKPC's interests are different from those held by the State of Arizona and Apache County in FCC (allowing intervention in the remedies phase alone). The applicant-intervenors in that case held existing contractual rights to timber proceeds from the affected lands and a separate legal duty to ensure public safety by managing forest fires. EKPC, on the other hand, does not have an existing contractual or statutory right to receive funds from RUS. EKPC asserts that its statutory and contractual obligations to its customers form the basis of its "significantly protectable," but these interests will only be indirectly and speculatively affected by the NEPA compliance claim.

Unlike existing contracts for federal timber revenues which could have been directly affected by an injunction in FCC, EKPC's asserted "significantly protectable" interests consist solely of its statutory and contractual obligations to provide electric service to its customers. While these interests may be indirectly affected by the EKPC's ability to obtain financing from RUS, the interests themselves do not directly relate to "the property or transaction which is the subject of the [NEPA compliance] action," as required under FRCP 24(a). EKPC does not have any legal right to obtain financing for RUS; therefore, its interests that may be affected based on its potentially impaired ability to receive this funding do not qualify as "significantly protectable."

EKPC's interests are also unlike those in Churchill County, in which the Ninth Circuit allowed Sierra Pacific to intervene in the remedial phase because it was able to show that its legally protected water rights would be directly affected by the action.

EKPC's "sky is falling" arguments are also incorrect. This lawsuit is not a challenge to

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the two combustion turbines ("CT's"). This is a challenge to the 345 KV power line, which is being built in part to serve the proposed coal-fired CFB at Smith. Marshall Decl., attachment 1 at 5; attachment 3 at 3-4; RUS Answer ¶ 31. In other words, EKPC would not need a 345 kv power line to serve just the two CT's.

In any event, EKPC's claim about the lights going out is contradicted by its own document. Attachment 1 to Marshall's Declaration (at 2) states that the new CTs are needed at least in part to replace power that EKPC used to get from a power purchase agreement. Of course, EKPC could buy power again if it needed to. In fact, EKPC has stated in other court documents that Kentucky has 1774 MW of natural gas combustion turbine facilities which are merchant plants, meaning they sell electricity to utilities like EKPC when they need it. Environmental and Public Protection Cabinet v. Sierra Club, No. 2007-Ca-001723-ME and No. 2007-Ca-001742-ME (Ky Ct. Appeals), Joint Motion of EKPC and other companies to File Brief as Amici Curiae, Attachment A, page 30.[1] See also Marshall's Dec., Attachment 2, page 12.

B. EKPC's Interests in this Action Will Be Adequately Represented by RUS

EKPC has also failed to meet the fourth prong of the test for intervention as of right. There is no basis for concluding that EKPC's interests in this action are not adequately represented by the government. The Ninth Circuit has stated that "a presumption of adequate representation generally arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee." Forest Conservation Council v. U.S. Forest Service, 66 F.3d 1489, 1499 (9th Cir. 1995) (FCC). Furthermore, the Ninth Circuit recently held that where the intervenor-applicant and an existing party "have the same ultimate

[1] Plaintiffs request that the court take judicial notice of the proceedings in the other lawsuit. See Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 n.6 (9th Cir. 2006).

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objective, a presumption of adequacy of representation arises." Northwest Forest Resource Council v. Glickman, 82 F.3d 825, 838 (9th Cir. 1996) (NFRC). EKPC and RUS agree that the proposal does not violate the law; indeed, their answers are virtually identical. See EKPC Proposed Answer ¶¶ 3, 4, 38, 39, 47, 48, 52, 53; RUS Answer ¶¶ 3, 4, 38, 39, 47, 48, 52, 53. There is, therefore, no useful purpose to be served by granting EKPC intervenor status.

II. EKPC DOES NOT MEET THE TEST FOR PERMISSIVE INTERVENTION

The Ninth Circuit has stated that permissive intervention pursuant to Federal Rule of Civil Procedure 24(b)(2) should be granted only if the proposed intervenor "will significantly contribute to [the] full development of the underlying . . . issues in the suit and to the just and equitable adjudication of the legal questions presented." Spangler v. Pasadena City Bd. of Ed., 552 F.2d 1326, 1329 (9th Cir. 1977). The issues regarding RUS's compliance with the laws that govern the project at issue can be fully developed by the present parties.

EKPC has not demonstrated that it will "supplement the position already taken by the other parties." Environmental Defense Fund v. Costle, 79 F.R.D. 235, 244 (D.D.C. 1978), cert. denied, 439 U.S. 107 (1979). EKPC, like RUS, wishes to prove that RUS complied with the relevant laws and that the proposal is important and in the public interest. Simply adding another voice echoing RUS's is not a significant contribution to development of the issues.

Where the "proposed intervenors would present no new questions to the court, conferring *amicus* status is generally preferred over a grant of permissive intervention." Oregon Environmental Council v. Oregon Dept. of Environmental Quality, 775 F. Supp. 353, 359-60 (D. Or. 1991). In Oregon Environmental Council, the court denied a motion for permissive intervention based on the lack of "new questions" brought before the court by the movant.

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Addition of EKPC to this lawsuit will not supplement the position taken by RUS to any significant degree, nor will it give EKPC a greater ability to speak to the issues of the case than would amicus status. RUS, through its counsel, is capable of representing the issues pertinent to its case, and any supplementation by the EKPC would be duplicative. See NFRC, 82 F.3d at 839 (denying environmental organization intervention because it would not add significantly to the government's development of the issues).

Plaintiffs are also concerned, as courts have been, that allowing intervention will unnecessarily protract this litigation. For example, in British Airways Bd. v. Port Authority, the court stated:

> Additional parties always take additional time. Even if they have no witnesses of their own, they are the source of additional questions, objections, briefs, arguments, motions and the like which tend to make the proceeding a Donnybrook Fair. Where he presents no new questions, a third party can contribute usually most effectively and always most expeditiously by a brief amicus curiae and not by intervention.

71 F.R.D. 583, 585 (S.D.N.Y. 1976) (citation omitted).

III. THE COURT SHOULD LIMIT THE SCOPE OF INTERVENTION

Given the factors discussed in this brief, if this Court grants EKPC's motion to intervene, it should impose limits on EKPC's party status. See Fed. R. Civ. P. 24, Advisory Committee's Note; FCC, 66 F.3d at 1495-96 (9th Cir. 1995). Proper limits to impose include the following:

1) If it grants intervention, the Court should follow the Ninth Circuit's lead in FCC, allowing EKPC to participate only on issues involving injunctive relief. 66 F.3d at 1494, 1495 (and cases cited therein) . Such a limit would be proper, because it is only the various alternative forms of relief sought by plaintiffs that would have an impact on EKPC's interests. See id.

2) If this Court grants intervention, plaintiffs request that it also limit the

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intervention in order to avoid delays and interference with the expeditious prosecution of this case; specifically, a) this Court should not grant motions for extensions of time or discovery by EKPC, and b) the Court should require EKPC to consolidate, or at least coordinate, its briefing and other submissions of materials with RUS.

To be clear, when plaintiffs file their motion for summary judgment on the merits, that is not the remedy phase, and if EKPC is granted limited intervention, plaintiffs intend to segment the summary judgment motion from the remedy phase to make that distinction clear. The proposed limited intervention poses no procedural difficulties and has been consistently used in the Ninth Circuit to good effect.

CONCLUSION

Based on this brief and the documents before the court, plaintiffs oppose intervention by EKPC and respectfully request that if the court does allow intervention, it limit EKPC to the remedies phase of the litigation, and impose the additional limitations on intervention set forth above.

Dated June 13, 2008.

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